



Strathmore University
Law School

**DOUBLE INVISIBILITY: AN ASSESSMENT OF THE RIGHT TO VOTE FOR
PERSONS WITH INTELLECTUAL DISABILITY IN KENYA**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore

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By

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Declaration

I, **KABURU VALENTINE WAMBUI**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

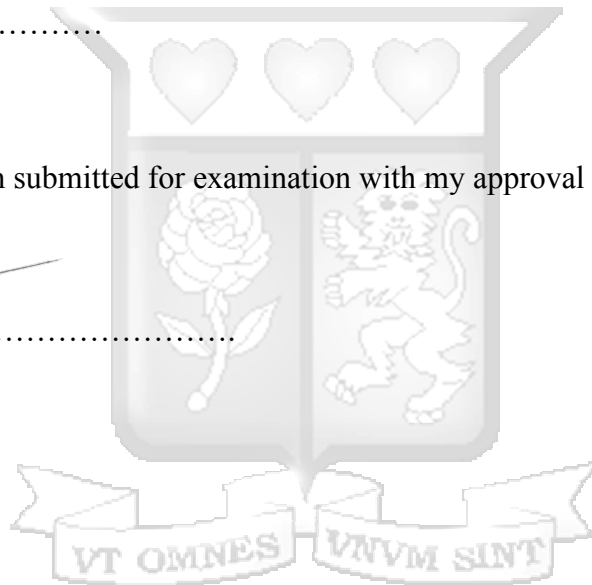
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Date: 14/02/2024

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Cecil Abungu



List of Abbreviation

CRPD	Convention on the Rights of Persons with Disabilities
IEBC	Independent Electoral and Boundaries Commission
KAIH	Kenya Association of Intellectually Handicapped
KSMH	Kenya Society of Mentally Handicapped
PWIDs	Persons with Intellectual Disabilities



List of Cases

Kenya Human Rights Commission v Communications Authority of Kenya & 4 others (2018) eKLR.

Nation Media Group Limited & 6 others v Attorney General & 9 others (2016) eKLR.

Wilson Morara Siringi v the Republic (2014) eKLR.



List of Legal Instruments

Constitution of Kenya (2010).

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3.

CRPD General Comment No. 6, Equality, and non-discrimination, 9 March 2018.

CRPD, General Comment No. 1, Equal recognition before the law, 11 April 2014.

Elections (General) Regulations (Legal Notice 128 of 2012).

Mental Health Act (Act No 27 of 2022).

Persons with Disabilities Act (Act No. 14 of 2003).



Abstract

Voting is arguably one of the most important rights and responsibilities held by a citizen in a country. The restriction of this fundamental right not only affects an individual's legal capacity but also undermines their human dignity. Historically, PWIDs have been denied legal capacity on the basis that they are not rationally capable of making decisions. This is due to the nature of their disability, which encompasses significant limitations in intellectual functioning and adaptive behavior. PWIDs support needs make them unique from the general population, and this distinctiveness does not equate to an incapacity in making decisions. The concept of being able to make independent political judgments is perceived as the basis of a democratic society. In this case, a democratic society has a reasonable utilitarian interest in an intelligent electorate. Therefore, if one is unable to act independently, any power they exercise is regarded as democratically illegitimate. Although reasonable, such a perspective neglects the support needs of PWIDs, who, despite their disabilities, deserve an equal right to vote. This paper examines the constitutional provisions on the right to vote in Kenya, where prevalent prejudicial attitudes have facilitated the exclusion of PWIDs right to vote. The imposition of blanket restrictions, such as the term 'unsound mind,' without clear assessment criteria for voting purposes, inadvertently restricts PWIDs from their right to vote. This uncertainty in law has led to prejudicial interpretations, perpetuating the misconception that PWIDs are incapable of making informed voting decisions. As this study aims to demonstrate, PWIDs are not of unsound mind, but in absence of good communication and require support to exercise their right to vote. The provision of reasonable accommodation, as proposed in this paper, could help PWIDs actualize their right to vote in Kenya.

1.0 Introduction

1.1 Background

The term intellectual disability is a socially constructed concept that has changed meaning over a period of time. The definition of the term depends on the classification system of society and the medical profession, as it was predominantly known as ‘mentally retarded.’¹ Intellectual disability in this context refers to the significant limitations in both intellectual functioning and adaptive behavior that manifest before the age of eighteen. Intellectual functioning is best captured by the general factor of intelligence, and it relates to the ability to reason, think, solve problems, and comprehend complex ideas. On the other hand, adaptive behavior is a collection of conceptual, social, and practical skills that can be performed and learned by individuals during their everyday lives. Conditions associated with intellectual disability include down syndrome, cerebral palsy, and autism.²

Persons with intellectual disabilities (PWIDs) have varying capacities, which helps in determining the type of support they require. Individuals with mild intellectual disability can live independently with minimum levels of support while those with moderate intellectual disability need moderate levels of support such as group homes. Individuals with severe intellectual disability have major delays in development and need extensive support. This is also vivid for those found with profound intellectual disabilities who cannot live independently due to their extremely limited ability and hence require pervasive support.³ Therefore, PWIDs are diverse in terms of their severity and support needs, rendering them more vulnerable.⁴

Legal capacity is an inherent right accorded to all people including those with disabilities and it is indispensable for the exercise of civil and political rights. It entails legal standing, which is the ability to hold rights and duties as well as legal agency which is the exercise of the rights and

¹ Dimopoulos A, *Issues in human rights protection of intellectually disabled*, Ashgate Publishing, Farnham, 2010, 9.

² Kenya National Commission on Human Rights, *A briefing paper on implementing Article 12 of the Convention on the Rights of persons with disabilities regarding legal capacity in Kenya*, 2018, 7.

³ Boat F and Wu J, ‘*Mental disorders, and disabilities among low-income children*’ The National Academic Press, Washington, 2015, 171.

⁴ Parmenter T, ‘The present, past and future of the study of intellectual disability: challenges in developing countries’ *50 Salud Pública México* 2, 2008, 124.

duties. Historically, PWIDs have been denied their legal capacity, which has consequently deprived them of their right to vote.⁵

In Kenya, PWIDs are not expressly excluded from the right to vote, but their participation is precluded by broad restrictions, such as those related to unsound mind, which lack specific assessment criteria. As a result, this has led to arbitrary interpretations which restrict them from the right to vote. Some efforts to register them have been countered by arguments that they are of unsound mind.⁶ Officers from polling stations in the past national and local elections have also restricted PWIDs from participating in polls without any clear justification or capacity tests.⁷

Additionally, their support needs are not adequately understood or accommodated in the voting process.⁸ Their unique needs are often met with mixed signals from electoral bodies, for instance, during the Constitutional Referendum, the Interim Independent Electoral Commissioner made a statement stating that PWIDs would not be able to vote. Despite his withdrawal and rectification of this statement, only a minimal number voted due to the numerous attitudinal barriers they faced at polling stations.⁹ In the 2013 general elections, the Independent Electoral and Boundaries Commission (IEBC) also expressed reservations regarding support for PWIDs during voting.¹⁰ As a result, this treatment limits their right to vote.

The laws in Kenya, particularly the Constitution, envision sovereign power vesting in the people, and this can be exercised either directly or through democratically elected representatives.¹¹ Additionally, Article 38(3)(b) of the Constitution acknowledges that every citizen has the right to vote without unreasonable restrictions.¹² People with disabilities are also entitled to assistance in voting by their person of choice.¹³ While it is apparent that the laws in Kenya promote the right to

⁵ CRPD, *General Comment No. 1, Equal recognition before the law*, 11 April 2014, 2-3.

⁶ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya' 2 *Strathmore Law Journal* 1, 2016, 121.

⁷ Mute L, 'Shattering the glass ceiling: ensuring the right to vote for adults with intellectual disabilities in Kenya' 2 *A Journal of the Philosophical Association of Kenya* 2, 2010, 13.

⁸ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 100.

⁹ Mental Disability Advocacy Center, *The Right to Legal Capacity in Kenya*, 2014, 37.

¹⁰ Kenya National Commission on Human Rights, *A briefing paper on implementing Article 12 of the Convention on the Rights of persons with disabilities regarding legal capacity in Kenya*, 2018, 60.

¹¹ Article 1 (2), *Constitution of Kenya* (2010).

¹² Article 38(3), *Constitution of Kenya* (2010).

¹³ Section 29, *Persons with Disabilities Act Kenya* (Act No. 14 of 2003).

vote for PWIDs, there is a lack of clarification regarding what constitutes an unreasonable restriction in relation to Article 38(3)(b) of the Constitution. Moreover, the duration of the restriction has not been specified as permanent or temporary.¹⁴

Article 83(1) of the Constitution of Kenya proceeds to restrict persons of ‘unsound mind’ from voting.¹⁵ ‘Unsound mind’ is the language adopted by the law and courts in Kenya when referring to persons with mental health conditions.¹⁶ These are persons who are diagnosed by qualified mental health practitioners to be suffering from mental illness, including conditions such as substance abuse as well as those displaying suicidal ideation and behavior.¹⁷ The framework for receiving and treating such persons is established to be in mental health facilities. PWIDs live in communities as opposed to mental health facilities on electoral days and are thus able to exercise their political rights.¹⁸ Hence, intellectual disability is not a mental illness and for the purposes of this paper, the concept of ‘unsound mind’ will mean persons declared as such by a judicial process after consideration of all relevant information.¹⁹ On that account, the majority of PWIDs are not of unsound mind; instead, they are in the absence of good communication and require support mechanisms to exercise their right to vote.²⁰

The Convention on the Rights of Persons with Disabilities (CRPD) which Kenya ratified envisions equal recognition before the law for persons with disabilities.²¹ It emphasizes that persons with disabilities should be viewed as active subjects capable of having rights rather than objects of social protection.²² Furthermore, it also acknowledges that States have a positive obligation to

¹⁴ Oyugi P, ‘The Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities in Kenya’ 3 *Journal of Law and Ethics* 1, 2018, 30.

¹⁵ Article 83(1), *Constitution of Kenya* (2010).

¹⁶ Kenya National Commission on Human Rights, *A briefing paper on implementing article 12 of the Convention on the Rights of persons with disabilities regarding legal capacity in Kenya*, 2018, 7.

¹⁷ Section 2, *Mental Health Act* (Act No 27 of 2022).

¹⁸ Kamundia E, ‘Kenya Report’ *African Disability Rights Yearbook*, 2014, 204.

¹⁹ Mute L, ‘Shattering the Glass Ceiling,’ 6.

²⁰ M. Redley, E. Maina, A. Keeling, and P. Pattni, ‘The voting rights of adults with intellectual disabilities: Reflections on the arguments and the situation in Kenya, England, and Wales’ 56 *Journal for Intellectual Disability Research* 11, 2012, 1031.

²¹ Article 12, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3.

²² *Wilson Morara Siringi v the Republic* (2014) eKLR.

ensure PWIDs participate in the electoral process, which involves providing reasonable accommodation for the actualization of their right to vote.²³

1.2 Statement of Problem

PWIDs vary in the severity of their condition and the level of support they require. In Kenya, they are not expressly precluded from voting; however, the lack of capacity assessments to determine who is of unsound mind for voting purposes, coupled with long entrenched prejudice, has justified the current practice of them being treated as incapable of making decisions. Efforts to register them for voting have been countered with arguments that they are of ‘unsound mind.’ Consequently, their support needs are neglected, exacerbated by mixed signals from electoral bodies. In Kenya, constitutional provisions such as Article 38(3)(b) lack clarification regarding what constitutes an unreasonable restriction, and Article 83(1), which further restricts a person from voting because of an ‘unsound mind,’ has no assessment criteria. This situation creates opportunities for potential abuse for PWIDs who have limited intellectual functioning and adaptive behavior. PWIDs are of sound mind but are in the absence of good communication skills and have peculiar needs, such as life-long support, which need to be understood and accommodated. They require equal recognition before the law despite their disabilities. This study intends to assess how the constitutional provisions on the right to vote can take into account the unique demands of persons with intellectual disabilities.

1.3 Research Questions

1. a) Who are PWIDs and what are their unique demands?
b) Why is the right to vote important for PWIDs?
2. How do the laws in Kenya address the right to vote for PWIDs, and what restricts them from voting?
3. How can reasonable accommodation address the restrictions faced by PWIDs?

²³ Oluchina W, ‘The right to political participation for people with disabilities in Africa’ 3 *African Disabilities Rights Yearbook* 1, 2015, 326.

1.4 Research Objectives

1. To study who PWIDs are, their unique demands, and why the right to vote is important to them.
2. To examine how the laws in Kenya address the right to vote for PWIDs and what restricts them from voting.
3. To assess how reasonable accommodation can address the restrictions faced by PWIDs.

1.5 Hypothesis

The constitutional provisions on the right to vote in Kenya can take into account the unique demands of PWIDs through reasonable accommodation. Evaluating such accommodation would entail a functional assessment of decision-making capacity to ascertain the voting status of PWIDs, whether they can vote independently or with support. Regardless of their status, reasonable accommodation would be provided to enhance the personal competencies of individuals, enabling them to vote.

1.6 Justification

This study is impactful to the PWIDs in Kenya, as it addresses the double invisibility they face. Disability is often narrowly perceived as physical impairment, and this impacts their quest for greater inclusion.²⁴ This study will also be useful to lawmakers since it will provide guidance on how to create or amend laws to enhance the legal capacity of PWIDs. Adjudicators will also benefit from this study as it will act as a guide on how to interpret cases when faced with questions such as the right to vote for PWIDs. As a result, this will progressively lead to the actualization of their voting rights. Furthermore, researchers working on Human Rights and Intellectual Disability Law will benefit from the findings of this study as it uniquely focuses on the concept of reasonable accommodation from a functional perspective. This will offer new insights and literature to the realization of voting rights for PWIDs.

²⁴ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 125.

1.7 Conceptual Framework: Relational Personhood

This study will be based on the concept of relational personhood which states that the moral value of a person is not found in their characteristics but in their relationships.²⁵ It is the moral values that they establish through their relationships that make them worthy of their moral status.²⁶ This approach departs from the personhood concept understood by liberal political theorists which heavily relies on the individual exercising their personhood independently. This perception considers interdependence as a threat to the legal system, and an individual is denied legal capacity if they cannot make a decision independently.²⁷ However, based on the relational concept, legal personhood is always relational because of the interdependence that exists among persons.²⁸ This concept, therefore, serves as a critique of the influential liberal political theory that deprives PWIDs of their capacity to vote because of their dependency. To understand relational personhood, it is crucial to understand the vulnerable and caring self-aspects.²⁹

Fineman defines vulnerability as a universal, inevitable, and enduring aspect of the human condition which stems not only from the body's nature, which is open to harm or hurt, but also limitations by our bodies defining what we can or cannot do. This makes all people dependent on other people and this view envisions universal vulnerability.³⁰ PWIDs may also face pathogenic vulnerability, and this is argued by Mackenzie, Rogers, and Dodds who state that in response to ameliorate vulnerability for an individual, it does the contrary and generates new ones. This brings out a paradoxical effect, especially in response to PWIDs who have limited cognitive functioning.³¹ For instance, recognizing PWIDs as vulnerable to manipulation in the electoral process and

²⁵ Herring J, 'Relational personhood' 1 *Keele Law Review* 1, 2020, 24.

²⁶ Herring J, 'Relational personhood,' 24-25.

²⁷ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood: A conception of legal personhood with insights from disability rights and environmental law' 30 *Griffith Law Review* 3, 2021, 531.

²⁸ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood,' 533.

²⁹ Herring J, 'Relational personhood,' 35.

³⁰ Fineman M, 'The vulnerable subject: Anchoring equality in the human condition,' 20 *Yale Journal of Law and Feminism* 1, 2008, 8-9.

³¹ Mackenzie C, Rogers W, Dodds S, '*Vulnerability: New essays in ethics and feminist philosophy*' Oxford University Press, New York, 2014, 9.

depriving them of the right to vote on this basis may heighten their vulnerability by labeling them as inferior moral and legal agents.³²

The underlying factor, however, is that PWIDs face some form of vulnerability regardless of whether it is universal or pathogenic. This vulnerable self makes the caring self-aspect evident, as dependency is no longer viewed as a threat, especially for PWIDs who require care due to their lifelong need for support. The care and support provided act as a positive measure for PWIDs to enhance themselves.³³ This study will use the relational personhood concept to critique the notion of individualized personhood, which takes away the right to vote for PWIDs due to their dependency and need for support.³⁴

1.8 Literature Review

1.8.1: On whether the Constitution of Kenya provisions on the right to vote take into account the unique demands of PWIDs.

The academic literature done in Kenya notes that the laws do not expressly exclude the right to vote for PWIDs.³⁵ However, lack of assessment criteria to determine who is of 'unsound mind', limited supported mechanisms to accommodate PWIDs and prejudicial societal attitudes restrict them from voting.

Oyugi states that the Constitution of Kenya restricts a person of unsound mind from voting, but the duration of such restriction is unclear as to whether it is permanent or temporary. She also concurs with Mute and Thuo in noting that the term 'unsound mind' has been left open for potential abuse because no interpretation has been provided for voting purposes.³⁶ On this basis, presiding officers from polling stations in the past national and local elections have, without clear assessments,

³² Snipstad M, 'Concerns regarding the use of the vulnerability concept in research on people with intellectual disability, 50 *British Journal of Learning Disabilities* 1, 2022, 112.

³³ Herring J, 'Relational personhood,' 36.

³⁴ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood,' 541.

³⁵ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 122.

³⁶ Oyugi P, 'The Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities in Kenya,' 30.

restricted PWIDs from voting. Additionally, Mute notes that the use of mannerisms or demeanor as traits to determine capacity should be barred.³⁷

Thuo highlights that the conflation of intellectual and mental disabilities makes it amenable to exclude PWIDs from voting. She notes that this exclusionary effect was noted in prior elections where the efforts to register PWIDs were countered by notions that they were of ‘unsound mind.’³⁸ Moreover, the stigma associated with PWIDs has been noted by Redley, Maina, Keeling, Pattni, and Thuo. They emphasize that due to this stigma, PWIDs encounter difficulties obtaining documents of birth registration and national identity cards, which are essential prerequisites for voter registration.³⁹

Supported decision-making mechanisms and the transformation of legal frameworks are the solutions envisioned by academic scholars in Kenya to enable PWIDs to vote. Conforming to the view of supported decision-making are scholars such as Redley, Maina, Keeling, and Pattni, who acknowledge the steps taken in Kenya to introduce support mechanisms when voting, such as ‘human readers.’ They, however, point out that such mechanisms have made decisions on behalf of PWIDs instead of offering them support.⁴⁰ Thus, supported mechanisms to help PWIDs make decisions when voting are limited.⁴¹ Despite the consultations with the United Disabled Persons of Kenya, the peculiar needs of PWIDs are yet to be addressed.⁴² Reasonable accommodation, which is distinctive in this research, has not been advocated for in the electoral sector for PWIDs. Although Thuo acknowledges reasonable accommodation as a positive measure to ensure substantive equality in political participation for PWIDs no extensive discussion is offered.⁴³

³⁷ Mute L, ‘Shattering the glass ceiling,’ 13.

³⁸ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya,’ 121.

³⁹ M. Redley, E. Maina, A. Keeling and P. Pattni, ‘The voting rights of adults with intellectual disabilities,’ 1031.

⁴⁰ M. Redley, E. Maina, A. Keeling and P. Pattni, ‘The voting rights of adults with intellectual disabilities,’ 1031.

⁴¹ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya,’ 126.

⁴² Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya,’ 125.

⁴³ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya,’ 106.

1.8.2: On the Importance of the Right to Vote

The right to vote is arguably one of the most important participation rights.⁴⁴ It is through this right, that a citizen asserts his or her place in the community.⁴⁵ Dworkin and Karst state that voting is a symbol of being recognized as a respected member of society.⁴⁶ Fishkin also accords with this view and notes that voting is the basis for equal citizenship and bound with dignity and its exclusion causes dignitary harm.⁴⁷ Young slightly departs from this view by stating the right to vote is far from sufficient for establishing equal citizenship however it is a necessary foundation.⁴⁸

From this basis, participation in voting is expressive and aligns with inherent values such as equality, legitimacy and information giving.⁴⁹ The expressive function is restricted when an individual does not get a chance to vote.⁵⁰ Winkler states that the term expressive voting constitutes two elements that are instrumental and constitutive. He offers a broader conception of voting in that it is not used for political ends but for individual participation in the community to affirm membership and for identity shaping.⁵¹ The constitutive act, which is relevant to this study involves two aspects, the first being an expression of an individual's identity. This is seen when the voter through participation expresses the idea of membership and a sense of belonging. The second aspect of cultural identity states that a country uses elections to express its values to its citizens and this transmits and regenerates ideals that form the core of cultural identity.⁵²

Blinder affirms that this expressive model of voting is of particular relevance to persons with diminished mental capacities because it shows an expressed connection to society.⁵³ PWIDs are

⁴⁴ Office of the United Nations High Commissioner for Human Rights, *Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*, 21 December 2011, 4.

⁴⁵ Combrinck H, 'Everybody counts: The right to vote of persons with psychosocial disabilities in South Africa' 2 *African Disability Rights Yearbook*, 2014, 83.

⁴⁶ Fishkin J, 'Equal citizenship and the Individual right to vote' 86 *Indiana Law Journal* 4, 2011, 1335.

⁴⁷ Combrinck H, 'Everybody counts,' 83.

⁴⁸ Fishkin J, 'Equal citizenship and the Individual right to vote,' 1335.

⁴⁹ Douglas J, 'The Foundational importance of participation: A response to Professor Flanders' 66 *Oklahoma Law Review* 1, 2013, 83.

⁵⁰ Combrinck H, 'Everybody counts,' 83.

⁵¹ Winkler A, 'Expressive voting' 68 *New York Law Review* 2, 1993, 331.

⁵² Winkler A, 'Expressive voting,' 368.

⁵³ Bindel J, 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities' 65 *New York University Annual Survey of American law* 1, 2009, 117-118.

often marginalized due to their diminished mental capacity, this expressive connection allows them to vote and validate their role as worthwhile members.⁵⁴ He asserts that if one would argue that they would derive a constitutive benefit from voting, courts could interpret the laws in favor of their enfranchisement.⁵⁵ Additionally, Kopel notes that voting is a politically expressive act that connects the voter to the community, and this is essential for democracy.⁵⁶

Contribution

Although the voting rights for PWIDs have received much discourse in terms of their actualization, the solutions arrived at in Kenya only envision the transformation of the legal framework and support. This study is unique since it proposes reasonable accommodation which is a separate element and complementary to support to enable PWIDs to vote.⁵⁷ Through this proposal, it will be able to contribute to Intellectual Disability and Human Rights discourse. This study is also related to specific sub-fields of psychology, such as community psychology, as it aims to validate interventions to enhance the participation and inclusion of the community of individuals with disabilities.⁵⁸ Additionally, this research complements scholars such as Mute, who provides perspectives on how the Kenyan legislature and executive can make the rights of PWIDs fully operational.⁵⁹ Flynn and Arstein-Kerslake also contribute to this perspective through their active support for legal capacity reform, advocating that PWIDs be treated as active subjects by the State.⁶⁰

⁵⁴ Bindel J, 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities,' 118.

⁵⁵ Bindel J, 'Equal protection jurisprudence and the voting rights of persons with diminished mental capacities,' 120.

⁵⁶ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness: Observations on a civic controversy' 17 *Yale Journal of Health Policy, Law, and Ethics* 1, 2017, 229.

⁵⁷ De Bhailis and Flynn E, 'Recognizing legal capacity,' 13.

⁵⁸ Balcazar E and Suarez-Balcazar Y, 'On becoming scholars and activists for disability rights' 58 *American Journal of Community Psychology* 4, 2016, 254.

⁵⁹ Mute L, 'Moving from the norm to practice towards ensuring legal capacity for persons with disabilities in Kenya' 9 *The Equal Rights Review* 1, 2012, 146.

⁶⁰ Arstein-Kerslake A and Flynn E, 'The General Comment in Article 12 of the Rights of Persons with Disabilities: A roadmap for equality before the law' 20 *The International Journal of Human Rights* 4, 474.

1.9 Methodology

This study will be qualitative in nature. It will be desk-based research as it will mainly utilize secondary sources such as journal articles, reports, books, chapters in books, and other internet resources. It will also rely on primary sources such as the law, in this case, the Constitution of Kenya, the Elections Act, the Persons with Disabilities Act, and the Convention on Rights of Persons with Disabilities among others. Additionally, it will be a deductive method because it will use the research questions to set the premise for the main claim.

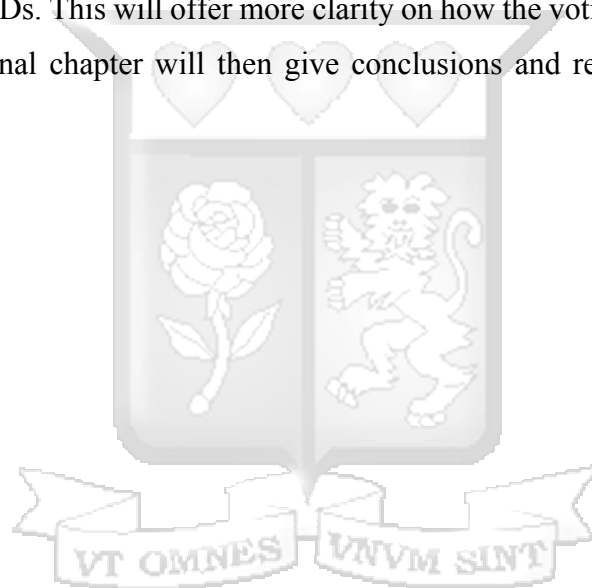
To undertake this proposed study, it is important to understand who PWIDs are, their unique demands, and why the right to vote is important to them. This will be done through a historical analysis to show how PWIDs were construed and compare it to the current society in light of their peculiar demands. A critical analysis will also be conducted to show why the right to vote for PWIDs is important. An evaluation of what the law ought to be saying deviating from the conventional understanding of the right to vote for PWIDs right to vote, will be provided. This will primarily involve secondary sources such as journal articles, reports, and books.

This study will also examine how the laws in Kenya address the right to vote for PWIDs and what restricts them from voting. This will mostly involve a doctrinal analysis since it will assess what the law is stating and analyze which interpretation should be accorded to domestic legislation. This chapter will rely mostly on primary sources such as the provisions in the Constitution of Kenya on the right to vote, the Convention on the Rights of Persons with Disabilities, and its General Comment which offers the interpretation. However, on restrictions faced by PWIDs, some secondary sources such as reports and articles will be used to highlight the evidence of these restrictions.

Furthermore, the study will conduct a critical analysis to assess how reasonable accommodation can address the restrictions faced by PWIDs. This approach will offer a new perspective, as it will evaluate these accommodations from a functional perspective. This assessment will utilize secondary sources such as journal articles, books, and reports.

1.10 Chapter Breakdown

Chapter one of this study will be the introduction. It will discuss among others the research objectives, conceptual framework, and justification. Chapter two will then study who PWIDs are, their unique demands, and why the right to vote is important to them. This chapter will set up a premise for the subsequent chapters as it demonstrates how they are construed by society and why their unique demands make the right to vote crucial for them. Chapter three will then examine how the laws in Kenya address the right to vote for PWIDs and what restricts them from voting. Specific provisions on the right to vote will be analyzed as well as the specific barriers that preclude PWIDs from voting. Thereafter, Chapter Four will assess how reasonable accommodation can address the restrictions faced by PWIDs. This will offer more clarity on how the voting rights of PWIDs ought to be understood. The final chapter will then give conclusions and recommendations from the findings of the study.



2.0 The Importance of the Right to Vote for PWIDs

2.1 Introduction

This chapter aims to understand PWIDs, their unique demands, and the importance of their right to vote. It will assess the suitability of the social-ecological model of disability in addressing their unique demands. Thereafter, it will examine how the limitations in intellectual functioning and adaptive behavior affect their ability to make decisions. Approaches that have been employed by States to evaluate their decision-making capacity for PWIDs will be discussed. Subsequently, this chapter will explore the link between legitimacy of elections and the right to vote for PWIDs. Justifications used to limit the right to vote for PWIDs will be discussed to analyze how mental capacity is interpreted in such rationales. Additionally, the chapter will consider an alternative way of understanding mental capacity in the exercise of legal capacity for PWIDs.

2.2 A social-ecological model of disability to address the unique demands of PWIDs

A model of disability is a conceptual framework that consists of propositions, assumptions, and guidelines about the nature of a disability. These models serve as human-made tools to understand the causes of disability and also suggest potential solutions.⁶¹ Using disability models achieves various purposes, such as shaping individual identity and addressing perceived needs.⁶² Different disability models have been proposed over time, but most of them fall short of fully grasping the unique demands of PWIDs.⁶³ The unique demands of PWIDs are their support needs, which makes them different from the general population. These needs can vary in nature, ranging from episodic to pervasive, and their intensity depends on the severity of the individual's condition.⁶⁴

There has been a proposed shift from understanding disability in terms of deficits alone and this shift has developed a new model of disability known as the social-ecological model.⁶⁵

⁶¹ Smart J, 'Models of disability: The juxtaposition of biology and social construction' in Riggart T and Maki D (eds) *Handbook of Rehabilitation counseling*, Springer Publishing Company, New York, 2004, 25.

⁶² Retief M and Letsosa R, 'Models of disability: A brief overview' 74 *HTS Teologiese Studies/ Theological Studies* 1, 2018, 1.

⁶³ Shogren K, 'Considering context: An integrative concept for promoting outcomes in the intellectual disability field' *Academia.edu*, 2013, 5.

⁶⁴ Wehmeyer M, 'Strengths-based approaches to disability, the supports paradigm, and the importance of the support's intensity scales' 33 *Revista Educação Especial*, 2020, 8.

⁶⁵ Wehmeyer M, 'Strengths-based approaches to disability, the supports paradigm and the importance of the supports intensity scales,' 3.

Understanding disability purely on deficits residing within the individual is attributed to the medical model, which states that the primary cause of social and personal restrictions is located only within the body.⁶⁶ As a result, the medical model has received immense criticism because it ignores the social aspect that can limit a person with a disability.⁶⁷

The social-ecological model advocated for in this paper recognizes that a person is constantly shaped by the environments in which they live and interact.⁶⁸ It defines disability as a state of functioning characterized by a significant and chronic mismatch between a person's competencies and society's demands. Therefore, the focus of this model is on the enhancement of the personal competencies that is the strengths and capacities of PWIDs, to enable their participation in society.⁶⁹ To fully participate in society, there exists a gap between personal competencies to environmental demands and to bridge the gap the social-ecological model advocates for support. In this context, support means strategies and resources that are employed to enable the person to participate in society.⁷⁰ These support needs would vary depending on the individual, for instance, a person with higher personal competency would need less intensity of support needs.⁷¹ Nonetheless, the support utilized in this model would be suitable for aiding PWIDs to achieve environmental demands, such as voting.

The social-ecological model of disability also recognizes a couple of interrelated factors that influence an individual's environment and consequently affect their human functioning. These factors include the microsystem which encompasses all immediate social members such as family and friends. The mesosystem involves the community and organizations that provide support to the individual, and lastly, the macrosystem covers broad categories such as the country, culture, and social-political influences. All these systems shape the environment and can thereby contribute

⁶⁶ Brown N and Nathan M, 'An ecological approach to modeling disability' Academia.edu, 2018, 2-3.

⁶⁷ Brown N and Nathan M, 'An ecological approach to modeling disability,' 4.

⁶⁸ Magasi S, Wong A, Gray D, Hammel J, Baum C, Wang C, and Heinemann A, 'Theoretical foundations for measurement of environmental factors and their impact on participation among people with disabilities' 96 *Archives of Physical Medicine and Rehabilitation* 4, 2015, 571.

⁶⁹ Thompson J, Shogren K, Wehmeyer M, 'Support and support needs in strength-based models of intellectual disability' in Wehmeyer M and Shogren K (eds) *Handbook of research-based practices for educating students with intellectual disability*, Routledge, 2016, 31.

⁷⁰ Thompson J, Shogren K and Wehmeyer M, 'Support and support needs in strength-based models of intellectual disability,' 32.

⁷¹ Wehmeyer M, 'Strengths-based approaches to disability, the supports paradigm and the importance of the supports intensity scales,' 7.

to enhancing support for PWIDs to meet the environmental demands.⁷² Therefore, the social-ecological model is suitable because its ideal outcome is interdependence, which aligns with the support needs of PWIDs in this context.⁷³

2.3 Approaches used by States to assess decision-making capacity for PWIDs

It is crucial to understand the limitations of PWIDs in intellectual functioning and adaptive behavior in order to analyze the approaches used to determine their decision-making capacity. Intellectual functioning involves the capacity to reason, think abstractly, solve problems, and comprehend complex ideas, while adaptive behavior comprises a set of practical, social, and conceptual skills that people learn to function in society. Limitations in these two aspects make PWIDs have differences in thought processes, comprehension, memory, reasoning and how to cope in society.⁷⁴ Scholars such as Greenspan have highlighted that limitations in adaptive behavior among PWIDs can make them extremely gullible, and sometimes this may overlap with the intellectual limitations when making a decision. Society demands hypothetical thinking associated with verbal fluency, abstract thinking, and comprehension of information and all these areas can be strenuous to PWIDs.⁷⁵ Hence, it becomes evident that PWIDs can encounter difficulties when making decisions.⁷⁶

From this premise, various approaches have been developed to assess the decision-making capacity of PWIDs. In this context, approaches refer to capacity tests or methods employed to attribute incapacity to PWIDs.⁷⁷ These diverse approaches have been used in most jurisdictions to determine the legal capacity of PWIDs to make decisions.⁷⁸ If an individual is found to have

⁷² Schalock R And Luckasson R, 'Defining and applying a functionality approach to intellectual disability' *57 Journal of Intellectual Disability Research* 7, 2013, 659.

⁷³ Shogren K, Dean E, Linnenkamp, Raley S, Martinis J, Blanck P, 'Supported decision making' in Khemka I, Hickson L (eds) *Decision making individuals with intellectual and developmental disabilities*, Springer International Publishing, Cham, 2021, 27.

⁷⁴ Schalock R, Luckasson R, and Tasse M, 'The relation between intellectual functioning and adaptive behavior in the diagnosis of intellectual disability,' 3.

⁷⁵ Khemka I, 'Understanding decision making and intellectual and developmental disabilities' in Khemka I, Hickson L (eds) *Decision making by individuals with intellectual and developmental disabilities*, Springer International Publishing, Cham, 2021, 265.

⁷⁶ Khemka I, 'Understanding decision making and intellectual and developmental disabilities,' 255.

⁷⁷ Dhanda A, 'Legal capacity in the disability rights convention: stranglehold of the past or the lodestar for the future' *34 Journal of International Law and Commerce* 2, 2007, 431.

⁷⁸ Marishet M, 'Legal capacity of persons with disabilities in Ethiopia: The need to reform existing legal frameworks' *55 International journal of law and psychiatry*, 2017, 9.

impaired decision-making skills from one of the approaches they are restricted from making a decision or exercising their legal capacity.⁷⁹ These exclusionary approaches adopted by States can be based on the medical diagnosis of the impairment, the functional ability to understand the nature and consequences of a decision, or an assessment of the outcome of an individual's decisions.⁸⁰

2.3.1 The Status Approach

The status approach relies on a medical diagnosis, and it denies an individual the legal capacity to make decisions once it is established that they have a disability.⁸¹ Therefore, if an individual has an intellectual disability he or she is deprived of legal capacity. In this approach, having the status of being labeled as disabled is deemed sufficient to deprive a person of the ability to make legal decisions. It categorizes individuals as either having full legal capacity or lacking it completely. Once it is established that a person lacks capacity, a third party, often a guardian, is assigned to make decisions on behalf of the individual.⁸² This approach is similar to the medical model of disability because they both declare that it is only a medical diagnosis that can determine whether a person is competent enough to make a choice.⁸³

2.3.2 The Functional Approach

The functional approach acts as a threshold test, determining a person's legal capacity to make a decision based on their capability to understand the nature and consequences of that decision. The basic features of the test are whether the person can retain, weigh, and use the information available to make a decision. Thereafter, the individual is assessed whether they can communicate the decision, and if not, they are deemed incapable of exercising their legal capacity to make decisions. This approach has however been highly endorsed due to its focus on the individual's decision-making skills rather than their status.⁸⁴ A mere presence of disability is regarded as insufficient to attribute incapacity to an individual, as the approach places emphasis on the individual's ability to

⁷⁹ Flynn E and Arstein-Kerslake A, 'Legislating personhood: Realizing the right to support in exercising legal capacity' 10 *International Journal of Law in Context* 1, 2014, 86.

⁸⁰ Weller P, 'Reconsidering legal capacity: Radical critiques, governmentality and dividing practice' 23 *Griffith Law Review* 3, 2014, 503.

⁸¹ Dhanda A, 'Legal capacity in the disability rights convention,' 431.

⁸² Mahony C, 'Legal capacity and detention: Implications of the UN Disability Convention for the inspection standards of human rights monitoring bodies' 16 *International Journal of Human Rights* 6, 2012, 886.

⁸³ Dhanda A, 'Legal capacity in the disability rights convention,' 432.

⁸⁴ Flynn E and Arstein-Kerslake A, 'Legislating personhood,' 86-87.

perform certain tasks.⁸⁵ For instance, it recognizes that a person might not be able to make a financial decision but has the capacity to make a voting decision.⁸⁶

2.3.3 The Outcome Approach

This approach presumes that if an individual with a disability makes poor decisions or has flawed decision-making skills, they have no capacity to make any decision.⁸⁷ As a result, if a PWID makes a poor decision they are perceived as incapable of carrying out acts that require complex thinking, such as political judgments.⁸⁸ Furthermore, the competence of a person is contested when they arrive at a decision not socially accepted, and this has led to arguments which contend that this approach is practically like the status approach since, once disability is established, the capacity of the person to make a decision will always be doubted.⁸⁹ Additionally, this approach is deemed unjust as it sets a higher decision-making standard for PWIDs, overlooking the fact that all individuals, regardless of ability, can make poor decisions.⁹⁰

In general, these approaches used by states to determine decision-making capacity have been subject to criticism since they presume that all PWIDs lack legal capacity, with the burden of proving the contrary placed on them.⁹¹

2.4 Legitimacy of elections and PWIDs right to vote

The concept of being rationally capable of making independent decisions is perceived as the basis of a democratic society.⁹² This notion stems from the democratic theory, which states that an individual needs to make independent judgments to actively participate in society. If they are unable to do so, any power they exercise is regarded as democratically illegitimate.⁹³ From this basis, the state is required to protect legitimacy of elections from any person who cannot

⁸⁵ Dhanda A, 'Legal capacity in the disability rights convention,' 431.

⁸⁶ Mahony C, 'Legal capacity and detention,' 886.

⁸⁷ Mahony C, 'Legal capacity and detention,' 886.

⁸⁸ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 112.

⁸⁹ Dhanda A, 'Legal capacity in the disability rights convention,' 433.

⁹⁰ Mahony C, 'Legal capacity and detention,' 886.

⁹¹ Dhanda A, 'Legal capacity in the disability rights convention,' 433.

⁹² Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 230.

⁹³ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 225.

independently cast a vote or lacks the mental capacity to make a decision.⁹⁴ In this case, the democratic society has a reasonable utilitarian interest in an intelligent electorate, and dependency is seen as a threat to legitimacy of elections.⁹⁵ Consequently, justifications have been developed to exclude PWIDs from the right to vote in order to protect legitimacy of elections.

2.4.1 Interpretation of mental capacity in justifications used to limit the right to vote for PWIDs
Mental capacity refers to a person's decision-making skills, which can vary based on individual differences, as well as social and environmental factors. PWIDs require support to enhance their decision-making skills and consequently exercise their legal capacity. As discussed in Chapter One, legal capacity entails the ability to hold both rights and duties, along with the capability to exercise them.⁹⁶ Justifications used to limit the right to vote for PWIDs emphasize the notion of mental capacity being exercised independently and this inadvertently excludes most PWIDs from voting. Additionally, all the justifications limiting the right to vote for PWIDs aim towards protecting the legitimacy of the democratic process.

The most common justification used to limit PWIDs from the right to vote is the alleged lack of voting capacity.⁹⁷ This rationale stems from the guardianship systems most PWIDs are placed under because of their need for life-long support. The guardian, who is often a family member, is assigned a substitute role in making decisions on behalf of the PWIDs, who is regarded as incapable of making any decision, including a voting decision. Therefore, the right to vote for a PWID is taken away because of their need for dependency. This justification, however, does not acknowledge that some PWIDs can still exercise their legal capacity and make decisions, as their need for support varies.⁹⁸

Another justification put forth is the prevention of fraudulent voting and undue influence. This argument assumes that PWIDs are more susceptible and prone to fraudulent voting due to their vulnerability, which may be taken advantage of by their caregivers providing support. While fraud

⁹⁴ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 226

⁹⁵ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 227.

⁹⁶ CRPD, *General Comment 1*, 3.

⁹⁷ Savery J, 'Voting rights and intellectual disability in Australia: An illegal and unjustified denial of rights' 37 *Sydney Law Review* 2, 2015, 297.

⁹⁸ Fiala- Butora J, Stein M, Lord J, 'The democratic life of the union: Toward equal voting participation for Europeans with disabilities' 55 *Harvard International Law Journal* 1, 2014, 88-89.

is a legitimate concern, there is no evidence or research done to prove that specifically disabled people are vulnerable to becoming victims of fraud. Thus, such an argument must be attributed to stigma and state prejudice. Closely tied to the concern of fraudulent voting is the rationale of undue influence, also referred to as electoral manipulation. This argument posits that PWIDs can be easily manipulated or unduly influenced due to the support they may require in order to vote, perpetuating the perception that dependency is a threat to legitimacy of elections. However, this argument does not consider that undue influence is ever-present and inevitable in the democratic voting process, since all voters including non-disabled are exposed to all kinds of information which can influence their voting decisions. Some individuals base their choices on the advice of their family members and friends while others may choose artistic qualities, personal characteristics, or the promised policies of the candidate.⁹⁹

The premises used to warrant these justifications may be reasonable, but the conclusions are arguably faulty. This independent view of interpreting mental capacity in the exercise of legal capacity, views the dependency or need for support for PWIDs as a threat to legitimacy of elections. Dependency of people with intellectual impairments should neither be considered as a democratic problem nor a ground for exclusion. Instead, State's should uphold their duty to reasonably accommodate them as opposed to use of exclusionary measures.¹⁰⁰ Furthermore, voting is not only about electing leaders but also a politically expressive act that connects the voter to the community and is essential for the public ritual of democracy.¹⁰¹

2.4.2 Alternative way of understanding mental capacity in PWIDs right to vote

PWIDs might face challenges in having full autonomy, where a person retains autonomy for some actions and not others, and this autonomy may also fluctuate, impairing their capacity to perform certain actions. Instead of excluding them from the right to vote based on their inability to act independently, the State has the responsibility to uphold and support the missing autonomy.¹⁰² This aspect can be linked to the relational personhood concept adopted in this paper, which posits

⁹⁹ Fiala- Butora J, Stein M, Lord J, 'The democratic life of the union,' 86-87.

¹⁰⁰ Beckman L, 'Political equality and the disenfranchisement of people with intellectual impairments' 6 *Social Policy and Society* 1, 2007, 18.

¹⁰¹ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 229.

¹⁰² Dimopoulos A, 'Issues in human rights protection of intellectually disabled persons,' 29-30.

that legal personhood is inherently relational, and interdependence exists among persons.¹⁰³ In a democratic society, a crucial concern is to ensure that all individuals, including PWIDs, have an equal right to vote.¹⁰⁴ The prevailing view of mental capacity as an objective, scientific and naturally occurring phenomenon overlooks its influence by social, political contexts, as well as the disciplines and professions that primarily evaluate it. Moreover, the decision-making skills of an individual vary and perceived or actual deficits in mental capacity should not be used as a justification for denying legal capacity.¹⁰⁵

The Convention on the Rights of Persons with Disabilities (CRPD) calls for reinterpretation of the way mental capacity is perceived in the legal framework, advocating for an approach that goes beyond assessing the individual's cognitive skills. The proposed interpretation asserts that mental capacity should focus on the decision-making skills of PWIDs from an interdependent perspective. This paper adopts this view as an alternative way of interpreting mental capacity of PWIDs, to actualize their right to vote. Based on this perspective, mental capacity assessments to determine the decision-making capacity of PWIDs ought to include support provided in the process.¹⁰⁶ Consequently, for one to be deemed incapable of making a decision all practical steps, which do not solely rely on cognitive skills, would have to be taken without success.¹⁰⁷ Such reconceptualization of mental capacity in the legal context would help PWIDs enhance their legal capacity while addressing their unique demands.¹⁰⁸ Additionally, by embracing this interdependent perspective, justifications to exclude PWIDs from the right to vote would no longer stand, as dependency would no longer pose a threat to legitimacy of elections.

2.5 Conclusion

This chapter set out to study PWIDs unique demands and the importance of their right to vote. It has determined the social-ecological model of disability as the most suitable for addressing the

¹⁰³ Arstein-Kerslake A, O'Donnell E, Kayess R, and Watson J, 'Relational personhood,' 533.

¹⁰⁴ Kopel C, 'Suffrage for people with intellectual disabilities and mental illness,' 229.

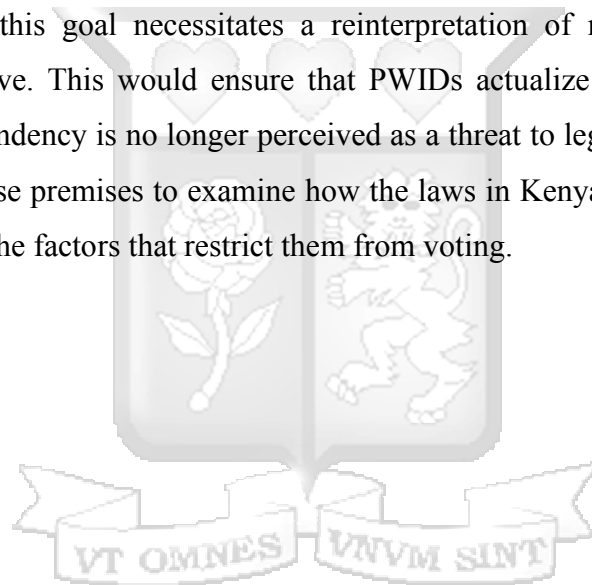
¹⁰⁵ CRPD, *General Comment 1*, 4.

¹⁰⁶ Browning M, Bigby C and Douglas J, 'Supported decision making: Understanding how its conceptual link to legal capacity is influencing the development of practice' 1 *Research and Practice in Intellectual and Developmental Disabilities* 1, 2014, 41.

¹⁰⁷ Series L, 'Relationships, autonomy, and legal capacity: Mental capacity and support paradigms' 40 *International Journal of law and psychiatry*, 2015, 9.

¹⁰⁸ Browning M, Bigby C and Douglas J, 'Supported decision making,' 41.

unique demands of PWIDs. This is due to the model's ideal outcome of fostering interdependence, which aligns with the support needs of PWIDs in this context. Furthermore, it has concluded that the status, functional, and outcome approaches used to determine the decision-making capacity of PWIDs unfairly presume that all PWIDs lack legal capacity and the burden of proving the contrary is placed on them. Additionally, it has been noted that in a democratic society, legitimate elections are characterized by all members making independent political judgments and this view has developed justifications that exclude PWIDs from the right to vote. In these rationales, mental capacity is interpreted from an independent perspective, categorizing PWIDs as either lacking voting capacity or being susceptible to fraud and manipulation. Instead of adopting such exclusionary measures, it is suggested that the State should make reasonable accommodations for PWIDs, and achieving this goal necessitates a reinterpretation of mental capacity from an interdependent perspective. This would ensure that PWIDs actualize their right to vote in an environment where dependency is no longer perceived as a threat to legitimacy of elections. The next chapter will use these premises to examine how the laws in Kenya address the right to vote for PWIDs and identify the factors that restrict them from voting.



3.0 The Restrictions PWIDs face when voting in Kenya

3.1 Introduction

This chapter seeks to discuss what is considered a reasonable restriction with regard to Article 38(3)(b) of the Constitution. It will evaluate this within the context of the reasonable standard provided for in the Constitution. This will eventually be weighed against the restrictions faced by PWIDs when exercising their right to vote. A discussion of a reasonable restriction within the realm of reasonable accommodation will also be offered. Thereafter, the chapter will examine the various support mechanisms within Kenya's electoral system to determine their effectiveness in accommodating PWIDs.

3.2 'Deciphering' a reasonable restriction in light of Article 38(3)(b) of the Constitution of Kenya

Political participation provisions in the Constitution of Kenya are expansive.¹⁰⁹ The right to vote is envisioned in Article 38(3)(b) of the Constitution of Kenya which acknowledges that every citizen has the right to vote by secret ballot in any election or referendum without unreasonable restrictions.¹¹⁰ The Constitution, however, does not define what is considered an 'unreasonable restriction' and the duration is also not specified as either permanent or temporary.¹¹¹

The right to vote is not absolute as the wording of Article 38(3) (b) on 'unreasonable restrictions' suggests, some reasonable restrictions are permissible.¹¹² One of the restrictions is expressed in Article 83 of the Constitution which excludes a person from voting if they are declared to be of unsound mind.¹¹³ While this provision does not expressly restrict PWIDs from voting, the lack of an assessment criteria to determine who is of unsound mind for voting purposes has led to prejudicial interpretations against PWIDs. This interpretation can, in part, be attributed to the history of conflation between intellectual disability and mental illness. Additionally, the Elections Act, which guides on the conduct of elections does not include any assessment criteria for

¹⁰⁹ Thuo L 'Realizing the inclusion of young persons with disabilities in political and public life in Kenya' *African Disability Rights Yearbook 4*, 2016, 33.

¹¹⁰ Article 38 (3), *Constitution of Kenya* (2010).

¹¹¹ Oyugi P, 'The implementation of Article 12 of the Convention on the Rights of People with Disabilities in Kenya,' 30.

¹¹² Bokao G, 'Political integrity as irrational and hypocritical values: Do the high standards of Chapter Six of the Constitution of Kenya breed a dangerous hypocrisy in the political class?' 1 *Kabarak Law Review*, 2022, 63.

¹¹³ Article 83, *Constitution of Kenya* (2010).

challenging from registration. In Kenya, mental capacity is considered synonymous with legal capacity and this conflation makes it amenable to exclude PWIDs.¹¹⁴ This assumption arises from the belief that individuals with limited decision-making skills, such as PWIDs, lack the capacity to make voting decisions. The notion of reasonable restrictions is an abstract concept and if unchecked can be abused and stretched beyond its intended limits.¹¹⁵

3.2.1 Reasonable restriction according to courts determination

To assess whether a restriction is reasonable, such as the unsound mind restriction, Article 24 of the Constitution outlines a standard of reasonableness when limiting a right. It states that a right can only be limited by law and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.¹¹⁶ Often, what is reasonably required in a democratic society cannot be easily determined and courts have acknowledged this difficulty. Nonetheless, the emphasis has been placed on respecting the rights and dignity of the individuals.¹¹⁷

Article 24 of the Constitution sets out some conditions that must be satisfied when limiting a right. These conditions include the nature of the right that is limited, the importance and purpose of limitation, the nature and extent of the limitation, the need to ensure the rights of one individual do not harm the rights of others, and the relation between the limitation and purpose and whether there are less restrictive means to achieve the purpose.¹¹⁸ The exercise of taking into account all these conditions is a balancing process that has been considered by Kenyan courts as a test of proportionality.¹¹⁹ Hence, to measure what is a reasonable restriction, courts employ a proportionality test, which varies based on specific circumstances. Proportionality is determined through a four-part test, which involves assessing:

¹¹⁴ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 120-121.

¹¹⁵ Kenya National Commission on Human Rights and the Open Society of Eastern Africa, *How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper*, 2013, 70.

¹¹⁶ Article 24, Constitution of Kenya (2010).

¹¹⁷ *Nation Media Group Limited & 6 others v Attorney General & 9 others* (2016) eKLR.

¹¹⁸ Article 24, Constitution of Kenya (2010).

¹¹⁹ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

1. Does the government action, establishing the restriction of rights, pursue a legitimate objective of sufficient importance?
2. Are the means employed in achieving the objective rationally connected (suitable) to that objective?
3. Are there alternative means available to achieve the same objective?
4. Do the beneficial effects of the restriction on the right outweigh the detrimental effects of the limitation; in other words, is there a fair balance between the private right and public interest?

Therefore, a reasonable restriction on a right would occur if all the questions above were answered in the affirmative. This implies that the restriction is designed for a proper purpose, the means employed are rationally connected to fulfill that purpose, the measures taken are necessary with no equally effective alternatives, and there is a fair balance between the importance of the stated purpose and the special importance of preventing the restriction on the constitutional right.¹²⁰

With regard to Article 38(3)(b) of the Constitution, the legitimate aim of the electoral principles in Kenya is to protect the integrity of the electoral process.¹²¹ Elections integral to the democratic process are vulnerable to errors and fraud, factors that, as discussed in previous sections, justify the exclusion of PWIDs from voting.¹²² Although a legitimate aim, the means employed ought to be rationally connected to the objective and this implies a narrowly tailored approach that infringes minimally on the rights of those affected.¹²³ The purpose of this narrow and careful construction is to minimize issues of ‘over-inclusion,’ as a law that is not narrowly tailored has the potential to lead to certain cases being decided unreasonably or irrationally.¹²⁴

In Kenya, only a blanket restriction is provided, leading to evident issues of over-inclusion, particularly for PWIDs. For instance, prior to the 2013 general elections efforts to register them

¹²⁰ *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* (2018) eKLR.

¹²¹ Ochieng W, ‘Protecting integrity of the electoral process: Promise of the Maina kiai judgment’ Social Science Research Network, 2018, 2.

¹²² Ochieng W, ‘Protecting integrity of the electoral process: promise of the Maina kiai judgment,’ 9.

¹²³ Kiilu N, ‘Indirect discrimination: Huduma Namba (digital identification) and the plight of the Nubian community in Kenya’ 7 *Strathmore Law Review* 1, 2022, 37.

¹²⁴ Trikanad S, ‘Judicial trends: how courts applied the proportionality test’ Social Science Research Network, 2020, 12-13.

were countered by arguments that they were of unsound mind.¹²⁵ It is under the Article 83(3)(b) of the Constitution that some PWIDs are restricted from voting under the pretext they are of unsound mind.¹²⁶ The electoral agency is legally empowered to prevent persons of unsound mind from voting, however, there is no legal requirement to provide the agency with a register of such persons. Furthermore, in past national and local elections, the lack of any assessment criteria has led to presiding officers at polling stations arbitrarily restricting PWIDs from voting.¹²⁷ This treatment has had a significant impact, restricting the voting rights of PWIDs. In Kenya, mental capacity is a condition for one to register as a voter, which, although permissible, needs to be specifically circumscribed in scope and narrowly tailored.¹²⁸

Approaches that are over-inclusive fail to meet the least restrictive measure hence considered unreasonable.¹²⁹ Moreover, the mere reason for exclusion should not be based on disability as less restrictive means to prevent fraud and achieve the legitimacy of elections can be employed. If the state is concerned with the competence of an electorate, for those with or without disability, it should fulfill its duty to offer reasonable accommodation. This approach would achieve the same legitimate aim through less restrictive means.¹³⁰

Based on this premise, it is evident that in Kenya, the detrimental effects of restricting individuals of unsound mind from voting disproportionately affects PWIDs equal right to vote, which is a marker of their civic dignity.¹³¹ While the state aims to secure the integrity of elections, employing less restrictive means such as transparent support procedures can provide accommodation to PWIDs without compromising the legitimacy of elections.¹³²

¹²⁵ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 121.

¹²⁶ Kenya National Commission on Human Rights, *Making Bill of Rights Operational: Policy, Legal and Administrative Priorities and Considerations*, October 2011, 89.

¹²⁷ Mute L, 'Shattering the glass ceiling,' 13.

¹²⁸ Anderson J, 'Intellectual disability and human right to vote: Evolving conceptions of the universality of suffrage' in Anderson J and Phillips J (eds) *Disability and Universal Human Rights: Legal, Ethical and Conceptual Implications of the Convention on the Rights of Persons with Disabilities*, Netherlands Institute of Human Rights, Utrecht, 2012, 111-112.

¹²⁹ Kiilu N, 'Indirect Discrimination,' 37.

¹³⁰ Fiala- Butora J, Stein M, Lord J, 'The democratic life of the union,' 96.

¹³¹ Thuo L, 'Realising the inclusion of young persons with disabilities in political and public life in Kenya,' 26.

¹³² Braun K, 'Nothing about us without us: The legal disenfranchisement of voters with disabilities in Germany and its compliance with international human rights standards on disabilities' 30 *American University International Law Review* 2, 2015, 329.

3.2.2 The interplay between reasonable restriction and reasonable accommodation

Reasonable Accommodation means appropriate and necessary adjustments or modifications that ensure persons with disabilities exercise their rights on an equal basis with others.¹³³ These adjustments and modifications can be considered as less restrictive and equally effective alternatives to achieve the legitimacy of elections. However, as the term suggests, there are limits to the accommodation up to what is considered reasonable. A reasonable restriction that has been acknowledged in the CRPD is where the adjustment or modification in question is not disproportionate or imposes an undue burden on the party providing the accommodation.¹³⁴ Only in comparison can an adjustment or measure be deemed proportionate or disproportionate. In terms of reasonable accommodation, what is considered proportional are not the measures themselves but the cost, finances, or effort of such measures.¹³⁵ The CRPD does not specify the exact point at which the created burden is regarded as disproportionate. Some authors argue that the absence of economic or material standards in the Conventions is due to the gradual realization accorded to State parties, which allows them to utilize accommodations based on their own economic capacity.¹³⁶ Therefore, Kenya could act on its own capacity to realize their reasonable accommodations for PWIDs.

The burden of proving such disproportionately is however directed to the party providing such accommodations. In the voting sector, the only reasonable and main provider is the State, and although there is no specified economic standard, it is required to demonstrate its inability to afford accommodations through an objective assessment. Thus, this creates a form of reasonability test, as discussed earlier, with the focus shifting to material and financial conditions.¹³⁷

Similar to the reasonable restriction on the right to vote, a reasonable restriction in the context of a reasonable accommodation, would be deemed proportional if the adjustment or modification aligns with the constitutional objective of maintaining legitimacy of elections. For instance, if preventing fraud is one of the objectives, the accommodation should be transparent enough to

¹³³ Article 2, *Convention on the Rights of Persons with Disabilities*.

¹³⁴ Henrard K, 'Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forwards and missed opportunities' 14 *International Journal of Constitutional Law* 4, 2016, 963.

¹³⁵ Edling A, 'Reasonable Accommodation' Unpublished LLM Thesis, Lund University, Sweden, 2023, 24.

¹³⁶ Edling A, 'Reasonable Accommodation,' 48.

¹³⁷ Edling A, 'Reasonable Accommodation,' 43.

attain such an objective. When the balancing process comes into play, the benefits of the accommodation such as ensuring equal right to vote, must not be excessively detrimental to the providing party, in this case, the State. The evaluation of the type of accommodation and the financial resources must be weighed against the needs of PWIDs right to vote.¹³⁸ The State must show that all reasonable accommodations are exhausted and employing others would be impractical.¹³⁹ Given this duty, the burden of proving that an accommodation is disproportionate should be substantial, considering the extensive array of resources at the State's disposal.¹⁴⁰ In assessing whether a reasonable accommodation is disproportionate for the State, a proportionality assessment between the employed means and the overarching aim, which is the right to vote, should be taken into consideration.¹⁴¹ A reasonable restriction on accommodation would thus be one in which all potential accommodations are exhausted, and their implementation would either be disproportionate to the costs or impractical to preserve legitimacy of elections.¹⁴²

3.3 The extent to which Kenya's electoral system accommodates PWIDs

PWIDs need life-long support, and this makes them more dependent and vulnerable for the most part of their lives.¹⁴³ In Kenya, Section 29 of the Persons with Disabilities Act envisions that all persons with disabilities are entitled at their request to receive assistance from persons of their choice in voting.¹⁴⁴ The broad interpretation of this would imply that PWIDs can use an intermediary for assistance in voting.¹⁴⁵ Regulation 72 of the Elections (General) Regulations also recognizes assisted voting for people with disabilities.¹⁴⁶ The electoral system in Kenya generally envisions support for people with disabilities when voting.

¹³⁸ de Asis Roig R, 'Reasonableness in the concept of reasonable accommodation' *The Age of the Human Rights Journal* 6, 2016, 52.

¹³⁹ Megret F and Msipa D, 'Global reasonable accommodation: How the convention on the rights of persons with disabilities changes the way we think about equality' 30 *South African Journal on Human Rights* 2, 2014, 268.

¹⁴⁰ Megret F and Msipa D, 'Global reasonable accommodation,' 270.

¹⁴¹ *CRPD General Comment No. 6*, 8.

¹⁴² de Asis Roig R, 'Reasonableness in the concept of reasonable accommodation,' 52.

¹⁴³ Thuo L, 'Implementation of political participation standards for persons with intellectual disabilities in Kenya,' 110.

¹⁴⁴ Section 29, *Persons with Disabilities* (Act No. 14 of 2003).

¹⁴⁵ Mute, 'Shattering the glass ceiling,' 12.

¹⁴⁶ Regulation 72, *Elections (General) Regulations* (Legal Notice 128 of 2012).

The only reported instance of effective support for PWIDs in the voting process was in the 2007 presidential elections. In this case, The Kenya Society of Mentally Handicapped (KSMH) successfully advocated for funds from the United Nations Electoral Support Programme, which promoted voting for people with physical and sensory disabilities to be extended to PWIDs. The KSMH emphasized in their arguments before the Electoral Commission of Kenya that PWIDs were not of unsound mind but in the absence of good communication and support that prevented them from voting. With a ruling secured in their favor, trainers were recruited to support PWIDs in voting. Special voter training was provided, with the trainers acting as ‘human readers,’ using simplified language, pictures, sign language, gestures, and role-play to offer support. Despite the novelty of this program, it lacked safeguards against fraudulent voting, as the recruited human readers often made decisions on behalf of PWIDs rather than offering support. Additionally, due to the timing of the 2007 electoral violence, there were no complaints and the number of PWIDs who voted was small.¹⁴⁷

Currently, there are limited supported decision-making mechanisms for PWIDs when voting. Regulation 72 of Elections (General) Regulations, which envisions assistance, does not consider the unique needs of PWIDs as it homogenizes people with disabilities, presuming that they all require the same kind of support. Support needed by a person with a physical disability differs from that needed by an individual with intellectual disability. Besides, PWIDs have diverse support needs that vary according to the severity of their condition.¹⁴⁸ Additionally, in Kenya, for a person with a disability to be granted reasonable accommodation when voting they need to have a special card, and the assessment of obtaining such a card is based on the biomedical model. Despite the importance of medical factors, neglecting other social-ecological factors in the assessment may deprive PWIDs of the card that guarantees them reasonable accommodation.¹⁴⁹ It is therefore apparent that PWIDs accommodations are less understood and do not receive adequate attention. Consequently, electoral bodies tasked with supporting PWIDs often have mixed signals in addressing their unique needs. For instance, in the 2013 General elections the IEBC expressed

¹⁴⁷ M. Redley, E. Maina, A. Keeling and P. Pattni, ‘The voting rights of adults with intellectual disabilities,’ 1031.

¹⁴⁸ Thuo L, ‘Implementation of political participation standards for persons with intellectual disabilities in Kenya,’ 126.

¹⁴⁹ United Nations Development Programme, *Political Participation of People with Intellectual Disabilities and Psychosocial Disabilities*, 2021, 40.

reservations about providing support for PWIDs when voting, citing concerns about the practice of voter bribery and uncertainty on who was actually making the decision if they were supported.¹⁵⁰

In Kenya, electoral officials give much attention to the accommodations of people with visible disabilities.¹⁵¹ Inclusion for persons with disabilities has been taken to mean people with physical disabilities thereby creating a double invisibility for other categories such as PWIDs.¹⁵² Some PWIDs are accused of dishonesty and denied priority to vote in polling stations because their disability is not obvious enough, forcing them to wait for hours to vote. The majority of PWIDs have also been reported to have no identity cards because their dependent caregivers often neglect to support them in the application process. The absence of an identity card poses further limitations, as it is a prerequisite for voter registration.¹⁵³

3.4 Conclusion

This chapter set out to study the laws in Kenya on the right to vote for PWIDs and the restrictions they face from voting. The laws in Kenya do not expressly exclude PWIDs from voting, however, the blanket restriction based on the concept of ‘unsound mind’ is over-inclusive and not narrowly tailored. As a result, PWIDs have been inadvertently excluded due to the historical conflation between intellectual disabilities and mental disabilities. The absence of an assessment criteria to determine who is of unsound mind for voting purposes has further exacerbated the problem. Therefore, the beneficial effects of the unsound mind restriction have not outweighed the detrimental effects faced by PWIDs. The restriction disproportionately affects PWIDs equal right to vote and even if not perceived to be of unsound mind, PWIDs still face restrictions based on their support needs. Instead of resorting to exclusionary measures, less restrictive means, such as reasonable accommodations, should be incorporated to pursue the same legitimate objective, which is legitimacy of elections. The only reasonable restriction on such an accommodation would

¹⁵⁰ Kenya National Commission on Human Rights and the Open Society of Eastern Africa, *How to Implement Article 12 of the Convention on the Rights of Persons with Disabilities Regarding Legal Capacity in Kenya: A Briefing Paper*, 2013, 60.

¹⁵¹United Nations Development Programme, *Political Participation of People with Intellectual Disabilities and Psychosocial Disabilities*, 2021, 40.

¹⁵² Thuo L, ‘Ending the oppression olympics: Promoting the concomitant political participation of marginalized groups in Kenya’ *5 Strathmore Law Journal* 1, 2021, 76.

¹⁵³ Virendrakumar B, Joelly E, Badu E, and Schmidt E, ‘Disability inclusive elections in Africa: A systematic review of published and unpublished literature’ *33 Disability and Society* 4, 2018, 528-229.

be when all potential accommodations are exhausted, and if implemented any adjustment or modification would either be disproportionate to the costs or impractical. In Kenya, the evaluation of a special card that grants reasonable accommodation in the voting process is based on a bio-medical model. While valid, this approach has the potential of unreasonably restricting PWIDs, considering their inherently limited decision-making skills. Additionally, the support needs of PWIDs are often ignored, receiving less attention compared to individuals with visible disabilities such as physical and hearing impairments. Consequently, this oversight has led electoral bodies, such as IEBC, to express reservations regarding voting support for PWIDs. The next chapter will utilize this premise to examine how reasonable accommodation can enhance the right to vote for PWIDs.



4.0 Reasonable Accommodation for PWIDs

4.1 Introduction

This chapter will examine how reasonable accommodation can actualize the voting rights of PWIDs. It will discuss how a functional assessment of decision-making capacity would help in evaluating suitable accommodations for PWIDs. The types of reasonable accommodation that would be included in the functional assessment of decision-making capacity will also be evaluated. Thereafter, this chapter will assess the resource implications of such reasonable accommodation.

4.2 Adoption of a functional assessment of decision-making capacity

PWIDs are frequently at risk of having decisions being made for them because of their limitations in intellectual functioning and adaptive behavior, which is often equated with an inability to make decisions. However, this is not universally true, as with reasonable accommodations, they can effectively make a decision. In this context, reasonable accommodation means appropriate and necessary adjustments or modifications that ensure persons with disabilities exercise their rights on an equal basis with others. Therefore, this paper proposes a functional assessment of decision-making capacity to aid in the evaluation and provision of accommodations when a person's capacity to vote is reasonably questioned. It is worth noting that this assessment would presume every PWID has legal capacity, and its sole purpose would be to evaluate the necessary adjustments or modifications.

The assessment would first question whether the person understands, appreciates the nature, and recognizes the potential consequences of a voting decision. If a person does not, the concept of reasonable accommodation would intervene, implementing adjustments and modifications to enable the person to arrive at a decision and comprehend the potential consequences. If, despite reasonable accommodation, the person still cannot decide, a third party with personal knowledge of the individual may be asked to reasonably ascribe their actions or intentions. The role of the third party would be to offer support rather than make decisions for the individual.¹⁵⁴ From this perspective, it can be inferred that the functional assessment would help determine the status through which PWIDs can exercise their right to vote, whether independently casting a vote or

¹⁵⁴ Bach M and Kerzner L, 'A new paradigm for protecting autonomy and the right to legal capacity,' 98-99.

voting with support. Nonetheless, irrespective of the chosen status, reasonable accommodation is provided throughout the process.¹⁵⁵

The practicality of such an assessment would happen before elections, as exemplified in the 2007 presidential election where ‘human readers’ were recruited. However, in this case, a mock election would be conducted to evaluate the accommodations through which a person can vote. Afterwards, during the election period, the person would be granted the leeway to vote independently or with support depending on the type of accommodation determined in the assessment. Moreover, trained neutral presiding officers, well versed in PWIDs accommodations, would be recruited and be available in polling stations on the day of the elections to address any concerns that reasonably question an individual’s voting capacity. Therefore, through this assessment, the current arbitrary interpretations of the law that restrict PWID from voting would be eliminated. The diverse capacities of PWIDs make it difficult to determine who can or cannot vote, and the application of this uniform assessment would help resolve this uncertainty. It is essential to highlight that this assessment is different from the functional approach to determine legal capacity discussed in chapter two, as the proposed assessment focuses on evaluating accommodations and presumes legal capacity for all PWIDs.¹⁵⁶

A reasonable restriction in the functional assessment would occur if an individual, despite being provided with all reasonable accommodations, cannot arrive at the voting decision either independently or with support. This restriction would be deemed reasonable because no other equally effective means would be employed to enable the person to vote, and allowing the person to vote would go against the State’s interest in ensuring that there is legitimacy of elections.¹⁵⁷ Even if reasonably restricted, the duration of the restriction would be limited to the next election period. The functional assessment would allow for periodic reviews to assess whether the person can be reasonably accommodated to vote.¹⁵⁸ The person responsible for performing these periodic reviews would be the recruited neutral decision-makers appointed prior to elections. Furthermore, the court would play a role in interpreting the reasonableness of the restriction, particularly in cases

¹⁵⁵ Bach M and Kerzner L, ‘A new paradigm for protecting autonomy and the right to legal capacity,’ 59.

¹⁵⁶ Bach M and Kerzner L, ‘A new paradigm for protecting autonomy and the right to legal capacity,’ 99.

¹⁵⁷ Glen K, ‘Changing paradigms: Mental Capacity, legal capacity, guardianship and beyond’ 44 *Columbia Human Rights Law Review*, 2012, 134.

¹⁵⁸ Glen K, ‘Changing paradigms,’ 134.

where an individual is aggrieved by the decision reached through the functional assessment of decision-making capacity.

4.3 Proposed types of reasonable accommodation

The types of accommodation in the functional assessment would depend on the individual's voting status, which could be either independent or with support. For PWIDs who can vote independently, the envisioned accommodations would include providing information on the ballot paper in plain language, ensuring visibility and ease of comprehension. This accommodation would be particularly beneficial for individuals with mild and moderate intellectual disabilities who require episodic or limited support and can perform most daily tasks on their own. Additionally, procedures for marking the ballot papers would be designed to be easy to read, understand, and access. Another type of accommodation for PWIDs who can vote independently is allowing ample time. Given their limited intellectual functioning, PWIDs might need more time to think, reason, and understand information. In comparison to other individuals, they might not be able to grasp information quickly, and by including time adjustments, they can better understand information and make informed voting decisions.

If an individual cannot vote independently, support would be provided. In Kenya, assistance in voting for people with disabilities is envisioned in political provisions; however, the current support mechanisms are limited and do not effectively accommodate PWIDs. Support can be offered informally, where an individual preferring informal support may consult those close to them, typically caregivers who are often family members maintaining close contact with PWIDs. These caregivers can offer advice on how to vote and assist in arriving at a decision. A PWID has the freedom to accept or reject the advice. Support could also be formalized to mitigate issues of manipulation, undue influence, and fraud in elections. This would involve a form of agreement with sanctions in place if the supporter does not respect the will and preference of the individual.¹⁵⁹ This could mirror the violation of the secrecy provision outlined in the Elections Offences Act in Kenya. This study advocates for formalized support, as informal support has proven to hinder PWIDs from voting.

¹⁵⁹ Flynn E and Arstein-Kerslake, 'Legislating personhood,' 95.

Regardless of the type of support, the accommodation provided through this status by the supporter would include an interpretive role. The supporter would offer verbal explanations, clarification, and breakdown information to enable the individual to arrive at a decision. Through interpretation, the supporter would communicate and use language that is easy for the individual with intellectual disability to understand.¹⁶⁰ Such support would help bridge the gap between the personal competency of an individual and the environmental demands of society during voting. Additional accommodations, such as plain-language information and time adjustments, would also be required in the voting process.

4.4 Resource implications of reasonable accommodation

The adjustments and modifications utilized in the concept of reasonable accommodation are not supposed to impose an undue burden on the State or be disproportionate. Thus, a concern that might arise regarding the proposed reasonable accommodation is its resource implications, as accommodation is contingent on resources.¹⁶¹ Factors to be taken into consideration include the cost, availability of funding and time frame involved. It is essential to note that reasonable accommodations can incur both financial and non-financial costs.¹⁶² Financial costs in this context, would encompass the earnings or salaries for recruited members, such as the neutral decision makers, training expenses for these members, and production costs for materials. Non-financial costs include the time adjustments employed to provide PWIDs with reasonable time to understand the ballot paper and the support offered by their caregivers.

Kenya's electoral system is heavily dependent on donor funding, as evidenced in some general elections in the country.¹⁶³ Funds from donor agencies, such as the United Nations Electoral Support Programme, which promote voting for people with physical and sensory disabilities, could be extended to PWIDs. Moreover, such donor agencies could collaborate with the government in providing funding. The National Development Fund for People with Disabilities could also be

¹⁶⁰ Manktelow N, Chadwick D, Brewster S, and Tilly L, 'The perspectives of people with intellectual disabilities on their experience of voting in UK general elections' 36 *Journal of Applied Research in Intellectual Disabilities* 3, 2023, 636.

¹⁶¹ Genga S and du Plessis M, 'Critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation: A case study of Kenya's legal framework' 10 *African Disabilities Rights Yearbook*, 2022, 37.

¹⁶² CRPD General Comment No. 6, *Equality and non-discrimination*, 9 March 2018, 8.

¹⁶³ Thuo L, 'Realising the inclusion of young persons with disabilities in political and public life in Kenya,' 48.

utilized, where existing budgets could be extended to include PWIDs in the voting sector. The government could also allocate resources to organizations such as the Kenya Association of Intellectually Handicap (KAIH) to train their officials to serve as neutral decision makers. Such initiatives could potentially be voluntary since the officials would be already familiar with the unique needs of PWIDs. Additionally, these costs would be incurred occasionally during election years, making them less challenging to implement given the importance of the equal right to vote in a democratic society.¹⁶⁴

The proposed functional assessment of decision-making capacity could also be utilized to assist in budget allocation during elections for PWIDs. This would enable electoral agencies and the government to accurately allocate funds for PWIDs. Furthermore, it could be used in donor funding, where it would serve as a guide and provide information on resource needs to donors wishing to support PWIDs. Other non-financial resources such as support by caregivers or time adjustments, could be effectively accommodated by the electoral agencies without incurring additional costs.

4.5 Conclusion

This chapter set out to answer how reasonable accommodations would help resolve the restrictions PWIDs face. It has been determined that the process of providing and evaluating such reasonable accommodation would entail conducting a functional assessment of decision-making capacity. The practicality of this assessment would be demonstrated through mock elections, where individuals are provided with all accommodations and then assessed if they can vote independently or with support. If an individual can vote independently, the type of accommodations provided would include plain language information and time adjustments. On the other hand, if an individual can only vote with support, additional interpretive and communicative roles would be employed. In cases where the assessment concludes that a person cannot vote independently or with support, the reason for the restriction must be clearly stated. The only acknowledged reason for such a restriction should be that no accommodation can reasonably enable them to vote. The use of such a functional assessment would be beneficial in law, as it would eliminate arbitrary interpretations, ensuring a uniform application. Moreover, the assessment would effectively cater to the support

¹⁶⁴ Edling A, 'Reasonable Accommodation,' 48.

needs of PWIDs in the voting process. The resource implications for the accommodations would primarily be borne by the State. Resources could be both financial, with contributions from the State and donor agencies, and non-financial involving caregivers support and the time adjustments accommodated in the electoral process.



5.0 Conclusion and Recommendations

5.1 General Conclusion

The objective of this study was to assess whether the constitutional provisions on the right to vote in Kenya take into account the unique demands of PWIDs. The study commenced by utilizing concepts such as relational personhood in the first chapter to provide a lens through which the right to vote for PWIDs can be examined. Chapter two of this study set out to study the importance of the right to vote for PWIDs, and it determined the social-ecological model as a suitable model for addressing PWIDs unique demands. This model advocates for support and this helps bridge the gap between the personal competencies of the individual and the environmental demands. Approaches used to determine decision-making capacity for PWIDs such as the status and outcome approach have faced substantial criticism since they assume that all PWIDs lack the capacity to make a decision. Furthermore, justifications that have been used by States to exclude PWIDs from the right to vote all aim to protect the legitimacy of elections. While this perspective is reasonable, it intends to prioritize independence and overlooks the support needs for PWIDs. The interpretation of mental capacity from such justifications envisions an individual making independent political judgments, and dependency is viewed as a threat to the legitimacy of elections. The chapter concluded that mental capacity should be interpreted from an interdependent perspective to actualize the voting rights of PWIDs.

Chapter three set out to examine the laws in Kenya and the restrictions faced by PWIDs when voting. This chapter emphasized that, although the laws in Kenya do not expressly exclude PWIDs from voting, the broad restriction of 'unsound mind' is overly inclusive and not narrowly tailored. This determination was based on the court's interpretation of what constitutes a reasonable restriction, which was then weighed against the restrictions faced by PWIDs when voting. The chapter concluded that the detrimental effects outweigh the beneficial outcomes of the restriction, and this disproportionately affects PWIDs equal right to vote. Additionally, the lack of an assessment criteria to determine who is of unsound mind for voting purposes exacerbates the problem, as PWIDs have been restricted in polling stations by election officers from voting without clear tests. The chapter determined that, instead of exclusionary measures, less restrictive means such as reasonable accommodations should be utilized, as they would be equally effective in ensuring legitimacy of elections. Support needs and accommodation for PWIDs within Kenya's

electoral system receive less attention compared to other individuals with physical disabilities. This disparity should be addressed, as the only reasonable restriction on such accommodations would arise when all potential accommodations have been exhausted, and their implementation would either be disproportionate to the costs or prove impractical, thereby posing a threat to the legitimacy of elections.

Chapter four set out answer how reasonable accommodation can be utilized to enable PWIDs to vote. It proposed a functional assessment of decision-making capacity to aid in the evaluation of such accommodations and determine the voting status of PWIDs, whether independently or with support. Reasonable accommodation would be afforded irrespective of voting status, and for those who can vote independently, accommodations may include plain language information and time adjustments while for a person in need of support, interpretive and communicative roles would be offered. Through such an assessment arbitrary interpretation would be eliminated, ensuring a uniform application of the assessment. Undoubtedly, such a proposal comes with resource implications, which can be financial or non-financial. The State would bear the primary responsibility for covering the financial costs by utilizing donor agencies or national development funds for people with disabilities. Other resources that would not incur a financial cost include the support offered by the caregivers, which would be voluntary, and the time adjustments included in the voting process to enable PWIDs to comprehend the ballot paper. The aspect of reasonable accommodation has not been extensively discussed in relation to the right to vote for PWIDs. This study has aimed to bridge this gap by emphasizing the importance of the right to vote for PWIDs and advocating for reasonable accommodation to help them fully realize their voting rights.

5.2 Recommendations

To attain the equal right to vote for PWIDs in Kenya, collaborative efforts are required from the legislature, future researchers as well as advocacy by electoral agencies such as IEBC, the community, and organisations for people with disabilities.

5.2.1 Review of the concept of ‘unsound mind’

The concept of ‘unsound mind’ for voting purposes in Kenya has been highlighted in this study as over-inclusive and not narrowly tailored. Additionally, there is a lack of assessment criteria to determine who is of unsound mind for voting purposes. The legislature needs to review this

restriction as it has inadvertently led to prejudicial interpretations against PWIDs. It should be crafted in a narrowly circumscribed manner to minimize problems of over-inclusion, thereby ensuring the equal right to vote for PWIDs.

5.2.2 Advocacy for PWIDs right to vote

Public support for the right to vote for PWIDs should be promoted by the IEBC, organisations for people with disabilities such as KAIH, and the community. This advocacy would focus on understanding the unique demands of PWIDs in the voting process. The reason for this recommendation is that the support needs for PWIDs are less understood and therefore ignored. They face double invisibility in comparison to other individuals with physical disabilities, and through advocacy, their needs will be better understood and consequently accommodated in the voting process.

5.2.3 Recommendation to Future Researchers

While much research focuses on the political participation rights of people with physical disabilities, particularly in Kenya, a significant gap exists as it tends to overlook other groups such as PWIDs. To address this gap, future researchers should focus on the political participation rights of PWIDs, offering potential solutions to help them realize their rights. For instance, research on their ability to stand for office is needed. Through the publication of reports or articles, awareness of PWIDs could be enhanced, ultimately contributing to the advancement of their voting rights. This study concludes that PWIDs can exercise their right to vote through reasonable accommodation and anticipates that the recommendations provided would help foster their quest for greater inclusion in society.

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